Filed 7/29/19 Kaura v. Compass Bank CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

VINOD K. KAURA et al.,	E069080
Plaintiffs and Appellants,	(Super.Ct.No. INC1302611)
v.	ORDER MODIFYING OPINION
COMPASS BANK,	[NO CHANGE IN JUDGMENT]
Defendant and Respondent.	

The opinion filed in this matter on July 18, 2019 is modified as follows:

All instances of "CALCRIM" are deleted and replaced with "CACI." These occur on pages 14, 21 (in footnote 11), 22, and 23.

Except for these modifications, the opinion remains unchanged. This modification does not effect a change in the judgment.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.

Filed 7/18/19 Kaura v. Compass Bank CA4/2 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

VINOD K. KAURA et al., Plaintiffs and Appellants, v. COMPASS BANK, Defendant and Respondent.	E069080 (Super.Ct.No. INC1302611) OPINION

APPEAL from the Superior Court of Riverside County. James T. Latting, Judge. Dismissed.

Barnes Law, Robert E. Barnes, and Tony J. Nasser for Plaintiffs and Appellants.

Reed Smith, Bernard P. Simons, Kasey J. Curtis, and Zachary C. Frampton for Defendant and Respondent.

Dr. Vinod Kaura and his wife, Veena Kaura, took out a loan from the predecessor in interest of Compass Bank (Bank) to buy an apartment complex. Later, they conveyed the complex — without the Bank's permission — to Valley & Mountain, LLC (Valley & Mountain),[1] a corporation created for this purpose.

In 2011, in the wake of the Great Recession, the Kauras stopped making payments on the loan. The Bank and the Kauras entered into a written loan modification agreement, which halved the interest rate and allowed Valley & Mountain to assume the loan. It provided, however, that it would not be effective unless and until a list of conditions precedent were satisfied. Among other things, these conditions precedent required the Kauras to provide the Bank "with evidence satisfactory to [the Bank] in [the Bank]'s sole discretion" that Mrs. Kaura's execution of the modification agreement, purportedly as president of Valley & Mountain, was duly authorized.

In the Bank's view, some of the documents provided by the Kauras raised questions about whether Mrs. Kaura was really the president of Valley & Mountain. The Bank therefore requested three specified documents, which, again in its view, would satisfactorily establish her authority. It gave the Kauras several extensions of time to provide them. However, one year after the modification agreement was signed, and six months after the Bank requested them, the Kauras had provided only one of the three documents (although they did provide a fourth document, which, they asserted, was adequate for the Bank's purposes). The Bank declared the modification agreement void.

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[1] We will refer to Dr. Kaura, Mrs. Kaura, and Valley & Mountain collectively as the Kauras.

The Kauras therefore filed this action against the Bank, asserting causes of action for breach of the modification agreement and for fraud. A jury, after a full trial, found in favor of the Bank on all causes of action.

The Kauras appeal. They contend that the trial court erred by:

1. Refusing to give CACI No. 312 ("Substantial Performance").

2. Giving an erroneous version of CACI No. 322 ("Occurrence of Agreed Condition Precedent").

3. Refusing to give CACI No. 325 ("Breach of Implied Covenant of Good Faith and Fair Dealing").

4. Denying the Kauras' motion for a mistrial.

5. Awarding contractual attorney fees against Dr. and Mrs. Kaura (rather than solely against Valley & Mountain).

6. Awarding attorney fees on the tort causes of action (rather than solely on the contract causes of action).

However, after the parties had fully briefed the issues, and after we had produced and provided our tentative opinion, the Kauras requested dismissal of the appeal.

Dismissal is a matter of discretion, not of right. (Cal. Rules of Court, rule 8.244(c)(2).) Although we will grant the request for dismissal, in light of the tardiness of the request (see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 5:64, pp. 5-29–5-30) and the lack of merit of the appeal, we will also express our views on the issues in this opinion. (*Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1065-1066.)

I

FACTUAL BACKGROUND

In 2007, the Bank's predecessor in interest lent Dr. and Mrs. Kaura[2] $4,050,000 to buy a 74-unit apartment complex in Indio.

In 2009, Dr. and Mrs. Kaura conveyed the complex to Valley & Mountain, without the Bank's consent, for "asset protection" purposes. This was a default under the loan.

In July 2011, the Kauras stopped making payments on the loan. The property was operating at a loss; it had effective (i.e., rent-paying) occupancy of only 43 percent.

In August 2011,[3] the Kauras contacted the Bank and requested a loan modification.

During the negotiations toward a modification, the Kauras provided various documents to the Bank, including personal financial statements and tax returns.

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[2] Dr. and Mrs. Kaura took out the loan as trustees of their family trust. However, they also guaranteed the loan in their individual capacities.

[3] Mrs. Kaura testified that she first contacted the Bank in July 2011, and at that time, a Bank officer told her, "'[Y]ou have to suspend your payments because we need to show hardship to start the modification process.'"

This was not reflected in any document. To the contrary, in August 2011, a different Bank officer told her: "[M]ake your July 11 [payment] immediately. I plan to transfer your loan however it must be current."

In February 2012, the Kauras and the Bank entered into two related agreements: a "Consent and Assumption Agreement" (assumption agreement) and a "Loan Modification Agreement" (modification agreement).[4]

The assumption agreement allowed Valley & Mountain to assume the loan. The modification agreement reduced the interest rate from 6.75 percent variable to 3 percent fixed.

A section of the modification agreement entitled "Conditions Precedent" provided: "[T]his Agreement shall not be effective, and [the Bank] shall have no obligation to implement the Loan Modification," unless and until certain conditions had been satisfied, "in [the Bank]'s sole judgment[.]" These included:

"2.2 Other than the identified Default, no Event of Default shall exist under any of the Loan Documents, and no event or condition shall have occurred and be continuing that would be an Event of Default if notice had been given or applicable grace/cure periods had expired, or both.

"2.3 [Valley & Mountain] shall have taken any and all actions and executed and delivered to [the Bank] any and all documents necessary or appropriate in [the Bank]'s sole discretion to effectuate this Agreement."

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[4] Specifically, the Kauras signed the agreements in January 2012 and the Bank signed them in February 2012. However, the modification agreement had an "Effective Date" of December 16, 2011.

"2.5 All actions required to be taken by [Valley & Mountain] in connection with the transactions contemplated by this Agreement shall have been taken in form and substance satisfactory to [the Bank].

"2.6 [The Bank] shall have received originals or certified or other copies of such documents as [the Bank] may reasonably request."

"2.7 [Valley & Mountain] shall have provided [the Bank] with evidence satisfactory to [the Bank] in [the Bank]'s sole discretion that the execution, delivery, and performance by [Valley & Mountain] of this Agreement, and any agreement or instrument required by this Agreement have been duly authorized."

The modification agreement required Valley & Mountain to start paying interest and property taxes immediately, i.e., even before the conditions precedent were satisfied.

Mrs. Kaura signed both agreements as President of Valley & Mountain, as well as in her own behalf as guarantor.

Mrs. Kaura had owned, either directly or through a corporation, some 11 to 13 "vacant [parcels], multi-family complexes, and office buildings in Nevada and California . . . ." She testified, however, that she did not "read any of the documents for any of the loans . . . ." In particular, she did not read the modification agreement. She did not have "the capabilities to go into the documents . . . ." Loan documents had "legal terms," which she did not understand, even if she tried. She "totally trusted" and "relied on" the Bank officer she was dealing with. He repeatedly assured her that various documents were just a “formality.” He added, “You don’t need to worry about it. And I’ll guide you and advise you and direct you all the way.”

On March 6, 2012, the Bank reminded Mrs. Kaura to send it the “organizational documents” for Valley & Mountain. It also reminded her that the 90-day approval period was about to expire. In April 2012, however, the Bank extended the approval period for another 90 days. In July 2012, when the approval period was again due to expire, the Bank extended it for yet another 90 days.

Meanwhile, the Kauras did provide some documents to the Bank.

One was Valley & Mountain’s articles of organization, dated May 2009, which showed that an entity called Nevada Blue Angel was its sole manager.

Another was Valley & Mountain’s “Operating Agreement.” It was also dated May 2009. However, it stated that Mrs. Kaura was its sole manager, whereas Nevada Blue Angel was a “[n]on-[c]apital [m]ember.”

Another was a corporate resolution, dated August 1, 2009, which stated again that Nevada Blue Angel was the manager of Valley & Mountain.

Yet another was Valley & Mountain’s 2011 “Operating Agreement.” It stated that Mrs. Kaura was its manager and “sole and initial [m]ember.”

Despite the 2009 and 2011 operating agreements, in August 2012, an attorney for the Kauras told the Bank that Valley & Mountain had been “operating under an oral agreement until recently.”

In light of these and other "inconsistencies," the Bank became concerned about Mrs. Kaura's authority to act for Valley & Mountain. On July 26, 2012, it asked her for three documents:

1. Proof that Nevada Blue Angel had transferred its interest in Valley & Mountain to Mrs. Kaura.

2. An amendment, filed in Nevada, of Valley & Mountain's articles of organization, showing a change of management from Nevada Blue Angel to Mrs. Kaura (Nevada amendment).

3. Valley & Mountain's statement of information, filed in California (California statement).

On July 30, 2012, August 14, 2012, and September 10, 2012, the Bank asked Mrs. Kaura (or her counsel) again for all of the then-outstanding documents.

In August 2012, the Kauras did send the Bank proof that Nevada Blue Angel had transferred its interest in Valley & Mountain to Mrs. Kaura. However, the Bank was still waiting for the Nevada amendment and the California statement.

In September 2012, the Kauras sent the Bank an "Annual List of Managers," filed in Nevada on August 23, 2012.[5] Although it was not an amendment of the articles of organization, as requested, it did recite that Mrs. Kaura was the managing member of Valley & Mountain.

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[5] An attorney for the Kauras testified that the Bank told him that an annual list of managers would be an acceptable substitute for a Nevada amendment.

Meanwhile, the Kauras paid the Bank about $48,000 in interest and about $65,000 in property taxes.

In October 2012, the Kauras' attorney told the Bank that they had mailed the California statement to the Secretary of State on August 17, 2012, but the Secretary of State was about three months behind on processing statements.

In October 2012, the approval period was due to expire again, but the Bank extended it for another 90 days. Thus, it was due to expire on January 1, 2013.

According to a Bank officer, in or shortly before December 2012, he warned Mrs. Kaura that the Bank still had not received either the Nevada amendment or the California statement. She denied this.

On Friday, February 1, 2013, the Kauras' attorney emailed the California statement to Mrs. Kaura. He testified that he had only just received it from the Secretary of State that same day.[6]

On Monday, February 4, 2013, at 1:16 p.m., the Bank emailed a letter to Mrs. Kaura giving written notice that the Kauras had failed to satisfy the conditions precedent because they had not provided either a Nevada amendment or a California statement.

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[6] The California statement was dated August 3, 2012 and file-stamped November 16, 2012.

At 1:29 p.m., Mrs. Kaura emailed the California statement to the Bank. The Bank responded that it still had not received the Nevada amendment, and as a result, the modification agreement was void.

In March 2013, the Bank sold the loan to Stabilis Fund II, LLC (Stabilis).

II

PROCEDURAL BACKGROUND

The Kauras filed this action against the Bank in April 2013.[7] In the operative (third amended) complaint, they asserted causes of action for fraud (i.e., both intentional and negligent misrepresentation). Valley & Mountain alone asserted additional causes of action for breach of contract, promissory estoppel, and declaratory relief.

The case went to the jury on just two causes of action, breach of contract and fraud.

After hearing evidence for 15 days but deliberating for only two hours, the jury returned a special verdict. On the breach of contract cause of action, it found that the modification agreement did not became effective because the conditions precedent were never performed.[8] On the fraud cause of action, it found that the Bank did not make any

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[7] The complaint also named Stabilis as a defendant. Stabilis was still a defendant when the case went to trial. After the case was closed to evidence, however, the Kauras elected not to seek a verdict on their claims against Stabilis. Thus, the trial court eventually entered judgment in favor of Stabilis.

[8] The jurors made this finding by an 11-to-1 majority.

false representation and did not intentionally fail to disclose any material fact. Accordingly, the trial court entered judgment against the Kauras and in favor of the Bank.

III

INSTRUCTION ON SUBSTANTIAL PERFORMANCE

The Kauras contend that the trial court erred by refusing to give CACI No. 312 (“Substantial Performance”).

A. *Additional Factual and Procedural Background*.

The Kauras requested this instruction. It would have provided:

“[The Bank] contends [Valley & Mountain] did not perform all of the things that they were required to do under the contract, and therefore [the Bank] did not have to perform their obligations under the contract. To overcome this contention, [Valley & Mountain] must prove both of the following:

“1. That [Valley & Mountain] made a good faith effort to comply with the contract; and

“2. That [the Bank] received essentially what the contract called for because [Valley & Mountain]’s failures, if any, were so trivial or unimportant that they did not justify cancellation of the contract.”

Counsel for the Bank objected that the Kauras had alleged full performance of all conditions precedent, rather than substantial performance. He also objected that the instruction was “confusing” in light of the other instructions on breach of contract. The trial court refused to give this instruction.

B. *Discussion*.

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) "Substantial evidence is 'reasonable, credible evidence of solid value such that a reasonable trier of fact could make the findings challenged . . . .' [Citation.]" (*Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1539.) "In reviewing whether a requested instruction was properly refused, the appellate court views the evidence in the light most favorable to issuing the instruction. [Citation.]" (*John Y. v. Chaparral Treatment Center, Inc.* (2002) 101 Cal.App.4th 565, 574.)

"'At common law, recovery under a contract for work done was dependent upon *complete* performance, although hardship might be avoided by permitting recovery in *quantum meruit*. The prevailing doctrine today, which finds its application chiefly in building contracts, is that *substantial performance* is sufficient, and justifies an action on the contract, although the other party is entitled to a reduction in the amount called for by the contract, to compensate for the defects. . . .' [Citation.]" (*Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1291.)

In arguing that there was sufficient evidence of substantial performance, the Kauras cite some 130 pages of exhibits. These pages seem to have been chosen at random rather than for their probative value. For example, the Kauras cite exhibits showing that they provided documents to the Bank *before* the modification agreement was formed. They cite exhibits in which the Bank was *asking* them for documents. Likewise, they cite various corporate documents, while citing no evidence that they ever *gave* them to the Bank. Other exhibits cited seem to be wholly irrelevant to the Kauras' performance.[9]

At best, the cited exhibits show that the Kauras (1) paid property taxes and (2) gave the Bank the Nevada list of managers. It was undisputed, however, that, during the approval period, they did not give the Bank either the California statement or the Nevada amendment. The Kauras do not explain how the cited evidence could support a substantial performance instruction. "[A] brief must contain '"meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error"' and contain adequate record citations, or else we will deem all points 'to be forfeited as unsupported by "adequate factual or legal analysis."' [Citation.]" (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942-943; see also Cal. Rules of Court, rule 8.204(a)(1)(B).) Thus, the Kauras have forfeited this argument.

However, we also address it, alternatively, on the merits.

The Bank argued below that the Kauras could not assert substantial performance, because they had pleaded full performance. That is not the law. "A general allegation of full performance of things on the plaintiff's part to be performed, or a similar allegation of performance of all conditions of the plaintiff's right to the money sued for, is a

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9 They even cite the exhibit list itself.

sufficient allegation of 'substantial performance.'" (8 Corbin on Contracts § 36.10 (rev. ed. 2018).) And even if it were not, under California law, a party can request instructions "upon questions of law developed by the evidence and not disclosed by the pleadings." (Code Civ. Proc., § 607a.)

The Bank also argued that the instruction would be confusing in light of the other instructions on breach of contract. We see no potential for confusion. CACI No. 303, defining breach of contract, provided that Valley & Mountain had the burden of proving, among other things, that it "did all, *or substantially all*, of the *significant* things that the contract required it to do . . . ." (Italics added.) Thus, it already alluded to the doctrine of substantial performance; CALCRIM No. 312 would merely have specified the doctrine in more detail.

In this appeal, however, the Bank raises two better arguments.

First, "substantial performance is ordinarily not applicable to excuse the nonoccurrence of an express condition precedent." (*Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.* (1995) 86 N.Y.2d 685, 693; accord, *MXL Indus. v. Mulder* (1993) 252 Ill.App.3d 18, 25; *Rodgers v. JPMorgan Chase Bank NA* (2016) 315 Mich.App. 301, 310; see, e.g., *Hardin, Rodriguez & Boivin Anesthesiologists, Ltd. v. Paradigm Ins. Co.* (7th Cir. 1992) 962 F.2d 628, 636.) "If . . . the parties have made an event a condition of their agreement, there is no mitigating standard of materiality or substantiality applicable to the non-occurrence of that event. If, therefore, the agreement makes full performance a condition, substantial performance is not sufficient . . . . [Citation.]" (Rest.2d Contracts, § 237, com. d, p. 220.)

More specifically, "a bank is generally not required to perform its obligations under a loan agreement unless a borrower has strictly complied with all conditions precedent." (*Becker v. HSA/Wexford Bancgroup, L.L.C.* (D. Utah 2001) 157 F.Supp.2d 1243, 1249.) For example, in *Brown-Marx Associates, Ltd. v. Emigrant Sav. Bank* (11th Cir. 1983) 703 F.2d 1361, a would-be borrower paid a bank $22,000 for a loan commitment. (*Id*. at p. 1363.) In it, the bank agreed to lend $1.1 million, if the borrower provided a number of specified documents, including "signed leases providing for at least $714,447 annual rentals . . . ." (*Id*. at p. 1364.) The borrower submitted signed leases that fell short by some $1,000 to $14,000. (*Id*. at pp. 1364-1365, 1366, fn. 4.) The bank therefore refused to close the loan. (*Id*. at pp. 1365-1366.) "The [borrower's] breach of contract claim was submitted to the jury on the theory of substantial performance, and the jury found for [the borrower] and awarded $543,000 damages." (*Id*. at p. 1366.) The trial court, however, granted a new trial motion, then granted summary judgment in favor of the bank. (*Ibid*.)

The appellate court affirmed. (*Brown-Marx Associates, Ltd. v. Emigrant Sav. Bank*, *supra*, 703 F.2d at p. 1371.) Applying Alabama law, it held that "the bank was entitled to require total compliance with the minimum annual rental requirement." (*Id*. at p. 1369.) It explained: "The language of the loan commitment here expressly provides that compliance with the minimum annual rentals provisions is a 'condition' to receiving the loan. . . . [¶] [‘]As a general rule, conditions which are either expressed or implied in fact must be exactly fulfilled or no liability can arise on the promise which such conditions qualify.[’] [¶] [Citation.]” (*Id*. at p. 1367.) “The doctrine [of substantial performance] is not primarily concerned with substantial performance of a ‘condition’ but rather with substantial performance by one party of his obligations arising out of the agreed exchange under the contract.” (*Ibid*.)

While we have not found any California cases that speak to this particular point, California does follow the analogous rule that the doctrine of substantial performance does not apply to the required mode of acceptance of an option contract. (*Jenkins v. Tuneup Masters* (1987) 190 Cal.App.3d 1, 7; *Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494, 498; cf. *Brown-Marx Associates, Ltd. v. Emigrant Sav. Bank*, *supra*, 703 F.2d at p. 1368 [“the requirements of an option contract governing the manner of acceptance are strictly applied”].)

The Kauras cite *Erskine v. Upham* (1942) 56 Cal.App.2d 235; they imply that it held that a condition precedent *could* be satisfied by substantial performance. There, however, the trial court found that the defendant had both waived and was estopped to demand strict performance. (*Id*. at p. 240.) The appellate court added, “It does not appear that either party expected 100 per cent [performance],” and “[t]he reasonable and practicable interpretation of the contract would be that substantial performance is sufficient and all that the parties intended at the time of entering into the agreement.” (*Id*. at p. 246.) We accept that the parties to a contract can agree, expressly or implicitly, that despite the usual rule, a condition precedent *can* be satisfied by substantial performance. However, there is no evidence of such an agreement here.

Second, allowing substantial performance here would conflict with the terms of the modification agreement itself. It required that all of the conditions precedent be satisfied "in [the Bank]'s sole judgment[.]" It further required the Kauras to deliver "any and all documents necessary or appropriate in [the Bank]'s sole discretion" and to provide evidence of authority that was "satisfactory to [the Bank] in [the Bank]'s sole discretion . . . ."

For there to be substantial performance, "' . . . the defects of performance must not pervade the whole or be so essential as substantially to defeat the object which the parties intend to accomplish.'" (*Brown v. Aguilar* (1927) 202 Cal. 143, 147-148.) Thus, for example, "[t]he law is settled that when it appears from the agreement that the parties have made time of the essence, strict performance is required unless it is excused. [Citation.]" (*Donnellan v. Rocks* (1972) 22 Cal.App.3d 925, 929, italics omitted.)

Some contracts provide that one party must render performance to the "satisfaction" of the other party. "Two tests are recognized when satisfaction as to performance or as to the status of something involved in the negotiations . . . is afforded to one party to an agreement: (1) the pure judgment or discernment of the individual person, controlled only by the element of good faith; (2) the judicially determined judgment or discernment of the so-called reasonable man. [Citations.]" (*Kadner v. Shields* (1971) 20 Cal.App.3d 251, 259.)

It has been held that, when a contract requires merely objective satisfaction, that requirement can be met by substantial performance. (*Cranetex, Inc. v. Precision Crane & Rigging of Houston, Inc.* (Tex. App. 1988) 760 S.W.2d 298, 301-302; *Whatcom Builders Supply Co. v. H.D. Fowler, Inc.* (1969) 1 Wash.App. 665, 671 [463 P.2d 232, 235-236]; *Handy v. Bliss* (1910) 204 Mass. 513, 519; *W.F. Painting v. McKeon* (Aug. 8, 2001, No. MPIC-CV-1999-178) 2001 Mashantucket Trib. LEXIS 25, at pp. *12-*14; see also *Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285, 294-296.)

By contrast, when a contract requires subjective satisfaction, substantial performance is not enough. (*Haehnel v. Trostler* (1907) 54 Misc. 262, 264-265; accord, *Plumbing Co. v. Carr* (1903) 54 W.Va. 272, 274; see also *W.F. Painting v. McKeon*, *supra*, 2001 Mashantucket Trib. LEXIS 25, at pp.*13-*14.)

The "sole judgment" provision here is essentially a subjective satisfaction requirement. "'[P]ersonal satisfaction" or 'sole discretion' cases . . . require application of a subjective standard to determine whether a party has demonstrated the satisfaction of a condition precedent to contractual liability." (*FEI Enterprises, Inc. v. Yoon* (2011) 194 Cal.App.4th 790, 800.) The word "sole," in particular, implies that a court cannot second-guess the Bank's judgment under an objective reasonableness standard. (See *Bevis v. Terrace View Partners, LP* (2019) 33 Cal.App.5th 230, 255-257 [where contract gave mobile home park "sole discretion" to refuse to allow an assignment, exercise of this option in an objectively unreasonable manner could not breach the implied covenant of good faith and fair dealing].) Thus, the conditions here could not be satisfied by substantial performance.

We therefore conclude that the trial court was not required to give CACI No. 312.

IV

INSTRUCTION ON CONDITIONS PRECEDENT

The Kauras contend that the trial court erred by giving an erroneous version of CACI No. 322 ("Occurrence of Agreed Condition Precedent"). They argue that the instruction should have listed only those conditions on which the Bank relied in its letter of February 4, 2013. The Bank responds that they forfeited this argument.

A. *Additional Factual and Procedural Background*.

As background for our discussion of forfeiture, we must outline the proceedings below, not only regarding CACI No. 322, but also regarding two additional instructions.

On or before May 31, 2017, both sides lodged (or at least exchanged) proposed jury instructions.

The Bank was requesting the following instructions:

1. CACI No. 303 ("Breach of Contract — Essential Factual Elements").

2. CACI No. 322 ("Occurrence of Agreed Condition Precedent").

3. CACI No. 323 ("Waiver of Condition Precedent").

These proposed instructions are not in the record. Working backward, however, from the parties' discussion of the instructions, as well as from the instructions that the trial court eventually gave, it appears that each of these three instructions stated that "the contract” required Valley & Mountain to satisfy the same three-category list of conditions:

“(a) all of the things required by the business loan agreement, the promissory note, the deed of trust, the assignment of rents, and the commercial guaranty agreements;

“(b) . . . each condition precedent set forth in . . . the . . . modification agreement;

“(c) . . . each condition precedent set forth in . . . the [assignment] agreement.”[10]

Thus, CACI No. 303 provided that, to recover for breach of contract, Valley & Mountain had to prove that it “did all, or substantially all” of the conditions in these three categories.

Likewise, CACI No. 322 provided that Valley & Mountain could overcome the Bank’s claim that the conditions in these three categories were not satisfied by proving that it did satisfy them.

And finally, CACI No. 323 provided that Valley & Mountain could overcome the Bank’s claim that the conditions in these three categories were not satisfied by proving that the Bank waived them.

On May 31 — and again on June 2 — the Kauras filed written objections to the Bank’s proposed instructions. They objected to CACI No. 303 and 322 on two grounds: First, that category (a) was erroneous, because they should not have to prove that they performed under the original loan; and second, that categories (b) and (c) should be

[10] One of the instructions lumped categories (b) and (c) together.

limited to the conditions precedent the Bank cited in its letter of February 4, 2013. They did not object to CACI No. 323, however, even though it listed the same three categories.

On June 5, the trial court directed counsel for both sides to discuss the proposed instructions and to specify the ones they had agreed on and the ones they had not.

On June 6, the trial court held an instructions conference.

Regarding CACI No. 303, the Kauras raised *different* objections than they had raised in writing. They objected only to category (c), and then only on the ground that those conditions applied only at closing, but the modification had never closed.[11] The trial court overruled this objection.

Meanwhile, the parties and the trial court agreed that the reference to the "assignment agreement" in category (c) was a typographical error for the "assumption agreement."

Regarding CACI No. 322, the trial court asked counsel for the Kauras:

"THE COURT: How does it look to you . . . ?

"[COUNSEL FOR THE KAURAS]: *I am in agreement with that, subject to my prior objection to the conditions precedent in the* . . . *assignment* [*agreement*], [and] we need to change that to 'assumption agreement.'

"THE COURT: Correct, throughout.

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[11] They also objected that "we were excused from complying because . . . the [B]ank [never] ask[ed] us to obtain those items . . . ." The Bank's counsel pointed out that there would be a separate instruction (i.e., CALCRIM No. 323) dealing with excuse or waiver. Counsel for the Kauras then agreed, "That's fine . . . ."

“[COUNSEL FOR THE KAURAS]: Other than that, for the record, you’ve already ruled on that, so that would be —

“THE COURT: Yes. Okay. So change ‘*assumption*’ . . . .” (Italics added.)

Finally, regarding CACI No. 323, the trial court asked counsel for the Kauras:

“THE COURT: . . . [W]hat do you think about that?

“[COUNSEL FOR THE KAURAS]: I don’t have a problem with their language.”

The trial court therefore gave the Bank’s version of all three instructions.

B. *Discussion*.

We begin with the fundamental principle that an instruction is “deemed excepted to.” (Code Civ. Proc., § 647.) In other words, “[a] party need not object at trial to an erroneous instruction in order to challenge the instruction on appeal. [Citation.]” (*Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 81.) However, “Code of Civil Procedure section 647 does not negate the doctrine of invited error.” (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 271.)

“‘Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error.’ [Citations.]” (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1000.) Here, initially, the Kauras objected to CALCRIM No. 322 on essentially the same grounds as they are raising in this appeal. Later, however, after the trial court had directed the parties to meet and confer, their counsel stated: “I am in agreement with [CALCRIM No. 322], subject to my prior objection to the conditions precedent in the consent and assignment . . . ." In other words, he approved of the instruction, except (as he had just argued regarding CALCRIM No. 303) with respect to category (c). This would have led the trial court to believe, reasonably, that the Kauras had given up on their initial objections. (Moreover, the Kauras are not raising their objections to category (c) in this appeal.) Their agreement with CALCRIM No. 323, which contained the same three-category list, would have reinforced this impression. This was more than a mere failure to object; it was invited error.

V

INSTRUCTION ON THE IMPLIED COVENANT

The Kauras contend that the trial court erred by refusing to give CACI No. 325 ("Breach of Implied Covenant of Good Faith and Fair Dealing").

A. *Additional Factual and Procedural Background*.

On May 31, 2017, the Kauras requested CACI No. 325. On June 5, 2017, however, they expressly withdrew this request. Thus, the trial court did not give the instruction.

B. *Discussion*.

"Although erroneous instructions may always be challenged on appeal (Code Civ. Proc. § 647 . . .), a party may not argue on appeal that the court failed to give a specific instruction when that party did not request such instruction. [Citations.]" (*Hilts v. Solano County* (1968) 265 Cal.App.2d 161, 171.)

Here, although the Kauras did initially request CACI No. 325, they withdrew their request. Indeed, once again, this rose to the level of inviting the asserted error. (E.g., *Scott v. C.R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 787.)

The Kauras claim this was not a forfeiture because it was a "necessary defensive action," once "it became apparent that the trial court would not grant the instruction . . . ." However, they do not cite any portion of the record showing that the trial court had already decided to refuse this instruction. Moreover, they do not explain why it was necessary to withdraw the instruction rather than just let the trial court refuse it.

VI

MISTRIAL MOTION

The Kauras contend that the trial court erred by denying their motion for a mistrial, which was premised on the Bank's introduction of evidence of (1) Valley & Mountain's bankruptcies and (2) the issuance of receiver's certificates.

A. *Additional Factual and Procedural Background*.[12]

1. *Motion in limine*.

The Bank filed a motion in limine to exclude "all evidence and argument regarding the acts and omissions of court-appointed [r]eceivers" for the property. They

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12 The Kauras' statement of facts on this issue is not properly cited to the record, in two respects. First, rather than pinpoint the relevant pages, they cite broad swathes of the record. (*Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 694, fn. 1.) Second, they cite their counsel's characterization of the record, rather than the record itself. "It is axiomatic that the unsworn statements of counsel are not evidence." (*In re Zeth S.* (2003) 31 Cal.4th 396, 413, fn. 11.)

argued that the subsequent orders discharging the receivers were res judicata and collateral estoppel with respect to the receivers' "actions, management, and omissions . . . ."

At the hearing on the motion, the Kauras did not oppose it. Accordingly, the trial court granted it.

2. *Testimony at trial*.

During trial, counsel for the Bank called Joseph Tuso, an officer of Stabilis

While Tuso was on the stand, counsel for the Bank elicited testimony and introduced exhibits showing that, after a receiver for the property was appointed, Valley & Mountain filed two successive bankruptcies. Counsel for the Kauras objected twice on relevance grounds; the trial court overruled these objections. He then stopped objecting.

Counsel for the Bank also elicited testimony that Stabilis had provided approximately $4 million, secured by receiver's certificates, to remedy code violations at the property. Counsel for the Kauras did not object to this testimony. However, he did object on relevance grounds to some (though not all) of the proffered exhibits related to the receiver's certificates, including the certificates themselves. After these objections were overruled, he cross-examined Tuso about the bankruptcies.

Counsel for the Kauras then asked: "[Y]ou have been opposed to [Receiver] Adams, believing that he has made excessive charges on the property; isn't that right?" Counsel for the Bank objected "based upon Your Honor's prior rulings[.]" Counsel for the Kauras responded, "Your Honor, he's put $4 million in receiver certificates into evidence. I'm not sure why they were admitted, but I certainly have the right and opportunity to establish whether that [$]4 million in receivership certificates is properly attributable to my clients . . . ."

The trial court heard argument outside the presence of the jury.

Counsel for the Kauras argued that counsel for the Bank had "opened the door" by eliciting evidence of the receiver's certificates, supposedly in violation of the trial court's in limine ruling.

Counsel for the Bank argued that the receiver's certificates were relevant to damages — the Kauras were seeking damages measured by the loss of their equity in the property, but the receiver's certificates reduced or eliminated the equity. He also argued that the receiver's certificates were relevant to show that the Kauras had defaulted on the original loan, by impairing the Bank's security.

The trial court ruled: "I understand why counsel [for the Bank] wanted to get the total amount involved to show there was no equity. [¶] If you think it makes sense to address that issue by saying . . . , 'We used to have equity, and our equity is less than it would have been otherwise, through no fault of our own,' I think you can do that."

3. *Motion for mistrial.*

The next morning, the Kauras filed a motion for mistrial, based on the admission of the evidence of the bankruptcies and of the receiver's certificates. They argued that the introduction of this evidence violated the trial court's ruling granting the motion in limine. They also argued: "The defense's stated reason for the admission of this evidence is that it allegedly showed that Plaintiffs were responsible for impairing its senior lien. Impairment of its senior lien, howsoever caused, is not relevant to Plaintiffs' claims of breach of the loan modification contract or any defenses thereto." The motion asked the trial court, in the alternative, to instruct the jury to disregard the evidence.

At the hearing on the motion, counsel for the Bank argued that the impairment of its security was relevant to damages. Counsel for the Kauras argued again that the admission of the evidence violated the trial court's ruling granting the motion in limine.

The trial court denied a mistrial. It ruled that its order granting the motion in limine had not been violated. However, it also ruled that the evidence was relevant to the Kauras' damages, so the fact that the motion in limine had been granted was "kind of a moot point."

B. *Discussion*.

"We review a motion for mistrial for abuse of discretion. '"A trial court should *grant* a mistrial *only* when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling *denying* a mistrial." [Citations.] [Fn. omitted.]' [Citation.]" (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1248.)

1. *Forfeiture*.

"Except in 'extreme' cases [citation], grounds for mistrial are waived by counsel's failure to make a timely and proper objection . . . ." (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2019) § 12:100, p. 12-25.)

Here, when counsel for the Bank initially introduced testimony regarding the receiver's certificates, counsel for the Kauras did not object. Thus, Tuso proceeded to testify to all of the key points regarding the receiver's certificates, without objection. It was only when counsel for the Bank followed up, by introducing the relevant exhibits, that counsel for the Kauras objected on relevance grounds, and then only sporadically and half-heartedly.[13] Thus, he forfeited any relevance objection.

We also note that counsel for the Kauras never objected specifically that the evidence of the receiver's certificates violated the trial court's in limine ruling. Admittedly, after the evidence was already in, he argued — for the first time — that its admission had violated the ruling. Even then, however, he did not ask that the evidence be stricken. He merely argued that *he* should be allowed to ask *additional* questions about the receivership, because counsel for the Bank had supposedly "opened the door." Thus, he also forfeited any objection on this ground.

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[13] When counsel for the Bank first moved to admit documents related to the receiver's certificates, counsel for the Kauras said, "I don't see the relevancy, Your Honor. *But if the Court is inclined to admit them*," then trailed off. (Italics added.) We view this as abandoning the objection and consenting to the admission of the documents.

The next time, the trial court asked counsel for the Kauras if he had any objections; he said, "Just relevancy, Your Honor." The trial court then said it was admitting the documents "[w]ithout objection." This was a reasonable characterization, given counsel's abandonment of his previous relevance objection. Moreover, counsel for the Kauras did not correct the court. Thus, once again, he abandoned the objection and consented to the admission of the documents.

By contrast, when counsel for the Bank started to introduce evidence of the bankruptcies, counsel for the Kauras did object on relevance grounds, twice. Although he ceased objecting after that, it would have been reasonable for him to conclude that further objections would be futile. (See *People v. Chatman* (2006) 38 Cal.4th 344, 380.) Accordingly, at that point, a relevance objection to the evidence of the bankruptcies was preserved for purposes of a subsequent mistrial motion.

Thereafter, however, he forfeited the right to bring a mistrial motion by failing to do so promptly. Instead, he cross-examined Tuso extensively regarding the bankruptcies. He did not make a mistrial motion at all until the following morning.[14]

If evidence of the bankruptcies was as prejudicial as the Kauras now contend, then cross-examining Tuso about it could only rub it in. In fact, the cross-examination ended up being longer and more detailed than the direct on this topic. Inferably, counsel for the Kauras believed he could dissipate any prejudicial effect via cross-examination. Under the maxim that "No one can take advantage of his own wrong" (Civ. Code, § 3517), this constituted a forfeiture of a subsequent mistrial motion.

2. *Merits*.

Separately and alternatively, we also consider this contention on the merits.

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14 The motion was in writing. One treatise cautions that "[a] motion for mistrial is usually made orally because it has to be made *immediately* after the misconduct occurs to avoid waiver [citation]." (Wegner et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2019) ¶ 12:151, p. 12-35.)

a. *Evidence of the receiver's certificates*.

Introducing evidence of the receiver's certificates did violate the trial court's in limine ruling. Technically, this constituted misconduct; the proper procedure would have been to approach the bench and request permission before offering the evidence. (See *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 794, disapproved on other grounds in *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 38, fn. 6.)

The trial court, however, "ha[d] inherent power to reconsider its prior interim orders . . . ." (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1101.) In the end, it reversed its in limine ruling; it ruled instead that the evidence was relevant. This nullified the violation of its in limine ruling and left only the relevance issue for our consideration.

And evidence of the receiver's certificates was indeed relevant to the Kauras' theory of damages.

Counsel for the Kauras consistently argued that his clients "lost the property," and therefore the measure of their damages was the fair market value of the property, *at the time of trial*, minus the unpaid amount of the loan. Counsel for the Bank disagreed. Nevertheless, the trial court ruled that the Kauras could introduce evidence of fair market value for this purpose. Accordingly, the Kauras called an expert appraiser, who testified to the fair market value of the complex, based on both comparable properties and capitalization of income.[15]

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[15] The Kauras note that the appraiser did not testify until after the trial court had already ruled. The Kauras, however, had already explained their damages theory. Moreover, the Bank knew from discovery what the appraiser would say.

The Bank's evidence of the receiver's certificates showed that, to remedy code violations, the receivers had encumbered the property to the tune of $4 million. Thus, it tended to show that, no matter what other similar properties might sell for, a buyer would pay $4 million less for this particular property.

In their reply brief, the Kauras assert that, if the evidence of the receiver's certificates was really relevant for this purpose, the Bank would have cross-examined the appraiser about them. But maybe the Bank chose not to give the appraiser a chance to rebut its argument. Or maybe the Bank just made a mistake. In any event, the evidence was relevant, regardless of the Bank's cross-examination strategy.

Also in their reply brief, the Kauras argue that, even if the evidence was relevant, the trial court erred by upholding objections to subsequent questions by their counsel that were intended to counter this evidence. They forfeited this argument by failing to raise it in their opening brief. (*W.S. v. S.T.* (2018) 20 Cal.App.5th 132, 149, fn. 7.)

b. *Evidence of the bankruptcies*.

The evidence of the bankruptcies did not even arguably violate any in limine ruling. Thus, the Kauras argue only that it was irrelevant and prejudicial.

The evidence of the bankruptcies was relevant for at least two reasons.

First, it demonstrated why the transfer of the property to Valley & Mountain was a default in the first place. As counsel for the Bank explained in closing, the transfer meant that, to delay a receivership, the Kauras did not have to file a personal bankruptcy — only Valley & Mountain needed to file a bankruptcy. Without this evidence, the jurors might have thought the transfer was merely a technical default, or that the Bank was asserting it in a heavy-handed and unnecessary manner.

Second, it tended to show Mrs. Kaura's financial sophistication. On the stand, she tried to paint herself as a financial naïf, unable to understand loan documents. However, as counsel for the Bank explained, filing two successive bankruptcies to delay a receivership was a "[v]ery sophisticated plan by somebody who has 35 years' experience in real estate . . . ." Her sophistication was particularly relevant to the fraud causes of action.

Finally, even assuming the evidence of the bankruptcies was indeed irrelevant, the Kauras have not shown that it was prejudicial.

There was ample evidence that Valley & Mountain was formed for purposes of asset protection, and that it had only one asset, the apartment complex. Moreover, the complex was operating at a loss; the Kauras were putting in money out of their own pockets to pay its expenses. Obviously, once the Bank pulled the plug on the loan modification, Valley & Mountain was insolvent. And there is nothing nefarious about an insolvent corporation seeking to protect its only asset by filing a bankruptcy. The evidence of the bankruptcies, even when the cross-examination is included, took up only a few minutes in a 15-day trial. Thus, the Kauras did not show that this evidence irreparably damaged their chances of receiving a fair trial.

VII

ATTORNEY FEES

The Kauras challenge the trial court's award of attorney fees, on two separate grounds. The Bank responds that they did not file a timely appeal from this award.

A. *Additional Factual and Procedural Background*.

The modification agreement contained an attorney fee clause. Specifically, it provided: "Should any party to this Agreement institute an action or any proceeding to enforce or interpret this Agreement, recover damages for breach of this Agreement, obtain declaratory relief in connection with this Agreement, or to otherwise obtain judicial, arbitration or mediation relief in connection with this Agreement, the prevailing party in such action shall be entitled to recover its attorney's fees, costs and expenses."

The Bank filed a motion for attorney fees, seeking $1,802,421. While the fee motion was pending, the trial court entered judgment. The judgment provided: "[The Bank] shall have and recover from [the Kauras] . . . costs . . . plus prevailing party attorneys' fees to be set by the court . . . at the hearing on the motion for attorneys' fees . . . ."[16]

In their opposition to the fee motion, the Kauras conceded that the Bank was the prevailing party and, as such, entitled to an award of attorney fees. However, they argued, among other things, that (1) only Valley & Mountain could be liable for attorney

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[16] The judgment had been drafted by counsel for the Bank and served on counsel for the Kauras, who did not object to it.

fees — not Dr. and Mrs. Kaura — because it was the only party plaintiff to the breach of contract cause of action; and (2) the trial court should apportion the attorney fees as between the breach of contract and the fraud causes of action.

On August 22, 2017, the trial court ruled on several of the issues involved in the attorney fee motion. First, it stated, "There is no question that [the Bank is] the prevailing part[y] and [is] entitled to [its] attorney's fees subject to a determination of the reasonable amount of those fees." Second, it denied any apportionment as between contract and tort causes of action. Third, it ruled that the Bank could only recover fees "based upon the prevailing rate in the Coachella Valley." Although its order did not say so in so many words, apparently it took the remaining issues under submission.

Four days later, on August 26, 2017, the Kauras filed a notice of appeal from the judgment and from the partial ruling on the motion for attorney fees.

On October 27, 2017, the trial court issued a further ruling on the fee motion; it resolved several additional issues, and it directed the Bank to submit a revised request for fees in conformity with its ruling. On November 3, 2017, the Bank did so.

On March 9, 2018, the trial court issued an order granting the fee motion but awarding the Bank the reduced amount of $1,228,044.50. On March 21, 2018, it entered an amended judgment awarding these attorney fees. The Kauras did not file a notice of appeal from either.

B. *Discussion*.

1. *Appealability*.

"'A postjudgment order awarding [or denying] attorney fees is separately appealable. [Citations.] The failure to appeal an appealable order ordinarily deprives the appellate court of jurisdiction to review the order. [Citation.] However, when the judgment awards attorney fees but does not determine the amount, the judgment is deemed to subsume the postjudgment order determining the amount awarded, and an appeal from the judgment encompasses the postjudgment order. [Citation.]' [Citations.]" (*Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1520, italics omitted.)

This case falls squarely within the exception. The judgment did award attorney fees to the Bank, although it left the amount for future determination. Arguably, such a purported award would not be controlling, if the trial court had not yet actually adjudicated the Bank's entitlement to attorney fees. (See *Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 1007-1010; *Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, 691-694.) However, the trial court went on to rule, on August 22, 2017, that the Bank was entitled to attorney fees; and on August 26, 2017, the Kauras did appeal from that ruling, as well as from the judgment. Hence, we have jurisdiction to review the subsequent fee award.

2. *Award against the Kauras*.

The Kauras contend that, because Valley & Mountain was the only plaintiff asserting causes of action for breach of contract, Dr. and Mrs. Kaura could not be held liable for attorney fees. Somewhat unhelpfully, the Bank does not respond to this argument.

The trial court could properly hold Dr. and Mrs. Kaura liable for attorney fees because they were guarantors of Valley & Mountain's liability for attorney fees.

In the trial court, the Bank brought its motion for attorney fees based not only on the modification agreement, but also based on the original loan and the Kauras' guarantees, each of which included an attorney fee clause. Moreover, the Kauras did sign the modification agreement, albeit as guarantors. Thus, at a minimum, they consented that Valley & Mountain would be liable for attorney fees.

The Kauras guaranteed the "Indebtedness of Borrower."

"Borrower" was defined as not only the Kauras (as trustees) but also "their successors and assigns."

"Indebtedness" was defined as "all of the principal amount outstanding . . . , accrued unpaid interest thereon and all collection costs and legal expenses related thereto permitted by law, *reasonable attorneys' fees*, arising from any and all debts, liabilities and obligations that Borrower . . . owes or will owe Lender under the Note and Related Documents and any . . . modifications . . . and substitutions of the Note and Related Documents." (Italics added.)

"Related Documents" included "all . . . agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness."

It is undisputed that Valley & Mountain brought this action on a contract that provided for an award of attorney fees to the prevailing party. Accordingly, once the Bank prevailed on the contract causes of action, it became entitled to reasonable attorney fees against Valley & Mountain. (Code Civ. Proc., § 1021 [“the measure and mode of compensation of attorneys . . . is left to the agreement, express or implied, of the parties”].)

Because Valley & Mountain had assumed the loan, it was a successor of the Kauras, and therefore it was a “Borrower” under the guarantees. The modification agreement was a “modification” or “substitution” of the note as well as one of the “Related Documents” under the guarantees. Thus, Valley & Mountain’s liability for attorney fees under the modification agreement was an “obligation” that the “Borrower” owed under a “modification” or “substitution” of the note as well as under the “Related Documents.” And thus, the attorney fees were an “Indebtedness” within the meaning of the guarantees.

It follows that the Kauras’ guarantees extended to Valley & Mountain’s liability for attorney fees. Admittedly, the modification agreement *itself* did not make the Kauras liable for fees; rather, they were liable because they guaranteed *Valley & Mountain’s* liability for fees under the modification agreement.

And finally, under California Rules of Court, rule 3.1702(a) and (b), the trial court was authorized to resolve any “claims for attorney’s fees provided for in a contract” by way of a posttrial motion. Thus, it could properly adjudicate the Bank’s “claim[]” against the Kauras "for attorney's fees provided for in a contract" — namely, in their guarantees. Certainly they did not raise any procedural objections to this.

We therefore conclude that the trial court properly held the Kauras liable for the Bank's attorney fees.

3. *Refusal to apportion*.

The Kauras also contend that the trial court erred by failing to apportion the fees as between the contract and noncontract causes of action.

"""[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract."' [Citation.]" (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751.)

"""[T]o determine whether an award of attorney fees is warranted under a contractual attorney fees provision, the reviewing court will examine the applicable statutes and provisions of the contract. Where extrinsic evidence has not been offered to interpret the [contract], and the facts are not in dispute, such review is conducted de novo. [Citation.]" [Citation.] "As the case law makes clear, the test is not whether the cause of action sounds in tort or contract. Instead, the sole question is the intent of the parties: did they intend to authorize the prevailing party to recover its attorney fees for a tort cause of action. [Citations.]" [Citation.]' [Citation.]" (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1076.)

The Kauras argue that the attorney fee clause in the modification agreement is narrowly worded and applies only in an action "to enforce or interpret this Agreement." To support this argument, however, they quote only part of the clause. Actually, the clause also applies in "an action . . . to . . . obtain judicial . . . relief *in connection with* this Agreement . . . ."[17] (Italics added.)

The Bank aptly cites *Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270. *Cruz* involved leases that "allowed for the recovery of attorneys' fees to the prevailing party in any civil action 'in connection with' the lease." (*Id*. at p. 1273.) The court held that this "broad language . . . covered all fees in any civil action stemming from the lease. . . . The underlying civil action encompassed both breach of contract and tort causes of action arising from the . . . leases . . . . Apportionment of fees for the breach of contract and tort causes of action was thus unnecessary because the broad language of the attorney fee clause in the contract permitted recovery of attorneys' fees for breach of contract or any other claim asserted *in connection with the lease*." (*Id*. at p. 1277.)

Here, the Kauras' cause of action for intentional misrepresentation alleged that the Bank promised to modify the loan, and that this promise "consisted of oral promises . . . and written promises in the form of . . . the executed Loan Modification Agreement . . . ."

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17 In their reply brief, the Kauras misrepresent the clause in a different way. They assert that it applies in an action to "'obtain judicial arbitration or mediation relief in connection with this agreement.'" In other words, they leave out the comma after "judicial." Thus, they argue that this clause "involves only arbitration or mediation." The comma, however, rebuts this argument.

Their cause of action for negligent misrepresentation alleged that the Bank negligently failed to "indicate . . . that [it] . . . had not modified the loan on the terms agreed upon in" the modification agreement. Moreover, they alleged that they relied on the Bank's "agreement to modify the loan on the terms agreed upon in" the modification agreement. Plainly, while these causes of action sounded in tort, they sought judicial relief "in connection with" the modification agreement.

The Kauras rely on Civil Code section 1717. But that section is irrelevant to this issue.

"By its terms, [Civil Code section] 1717 applies only to actions 'on a contract' and to fees 'which are incurred to enforce that contract.' As such, it does not apply to fees incurred to enforce tort or other *noncontract* claims. [Citation.] . . .

"Under [Code of Civil Procedure section] 1021, however, the parties to a contract may agree that the prevailing party in *any* litigation between them will be entitled to attorney fees, not only for causes of action based on contract, to which [Civil Code section] 1717 applies, but also for causes of action not sounding in contract, such as tort causes of action, to which [Civil Code section] 1717 does not apply. [Citations.] Thus, a broadly worded attorney fee clause may support a fee award to the prevailing party in a tort action . . . ." (Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 3d ed. 2018) § 4.25, pp. 4-18–4-19.)

We therefore conclude that the trial court was not required to apportion the attorney fees.

VIII

DISPOSITION

The appeal is dismissed. The Bank is awarded costs on appeal against the Kauras.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.